F. M. S.

[ORIGINAL CIVIL JURISDICTION]

ELPHINSTONE, C.J.

January 17, 1930.

RE: CHOP THOW CHIANG

EX PARTE: WILLIAM JACKS & COMPANY (MALAYA), LIMITED.

[SELANGOR BANKRUPTCY No. 69 of 1929]

Committal order — Bankruptcy Enactment 1912, Section 107.

The public examination of the debtor was held on the 17th January, 1930, and at the close of the examination the Official Assignee asked the Court to order the bankrupt to undergo imprisonment under Section 107 (c) of the Bankruptcy Enactment.

Debtor in person.

Raja Musa, Official Assignee.

P. B. Ford for a Creditor.

Held (Elphinstone, C.J.), that the Court will not make an order under Section 107 of the Bankruptcy Enactment except upon notice of motion served on the debtor and specifying the offence which the debtor is alleged to have committed and that the debtor must be supplied with a copy of the notes of the public examination.

[ORIGINAL CIVIL JURISDICTION]

ELPHINSTONE, C.J.

May 7, 1930.

[SELANGOR CIVIL SUIT No. 489 of 1929]

S. CHELLATAMBY..... Plaintiff

vs.

C. A. VELUPPILLAY..... Defendant

Evidence Ordinance Section 92—Admissibility of evidence of an oral agreement.

In considering the provisions of proviso 2 to Section 92 of the Evidence Ordinance, the Court must have regard to the degree of formality of the written document. When one of the parties to a suit has signed in the presence of witnesses, a written document which contains the terms of settlement of the suit, and judgment has been entered accordingly, evidence is not admissible of any separate oral agreement for the purpose of contradicting, varying or adding to or substracting from the terms set forth in the written document.

The facts appear sufficiently from the judgment of Elphinstone, C.J.

J. G. Campbell and *M. Morrison* for Plaintiff,

V. D. Knowles, H. D. Mundell and *B. J. P. Joaquim* for Defendant.

ELPHINSTONE, C.J.—The plaintiff, Chellathamby, in this suit seeks to enforce against the defendant, Veluppillay, an alleged verbal agreement made contemporaneously with and adding certain terms to a written contract (which in the evidence has been called the "Heads of Agreement") for the compromise of Civil Suit No. 235 of 1926 brought by Veluppillay to eject Chellathamby from No. 5, Prince's Road, Kuala Lumpur and for arrears of rent.

By his statement of defence (page 3 of Exhibit 13) in Civil Suit No. 235 of 1926 Chellathamby, the plaintiff in the present suit, alleged that in January, 1924 in consideration of $126,000 paid by Veluppillay on behalf of Chellathamby to the latters' chargees, No. 5, Prince's Road and twenty other pieces of land in Kuala Lumpur had been transferred by Chellathamby to Veluppillay upon trust that Chellathamby and Veluppillay should jointly sell the land at a time when the market price should improve and eredit Veluppillay with the $126,000 minus any rent recovered by him for the land, and that the balance of the proceeds of sale should be appropriated by Chellathamby, and that till the sale Chellathamby should be allowed to occupy No. 5, Prince's Road rent free. Chellathamby also denied having ever paid rent for No. 5, Prince's Road.

By the Heads of Agreement (page 12 of Exhibit 13) dated the 18th December, 1926 Chellathamby withdrew the allegation in his statement of defence of a trust and that he had never paid rent for No. 5, Prince's Road, and consented to judgment for $770 for rent and for an immediate order for ejectment and for costs. Chellathamby also agreed to pay a monthly rent of $30 for No. 5, Prince's Road.

By clause 5, Veluppillay, without putting himself under a binding obligation, stated that he would not execute his judgment for ejectment until the 31st March, 1927 subject to certain conditions.

On the 22nd October, 1926, Civil Suit No. 235 of 1926 came on for hearing. Chellathamby did not appear. Counsel for Veluppillay proved Chellathamby's signature to the Heads of Agreement by the evidence of an attesting witness whereupon judgment was given for Veluppillay for $770 and costs, and for an immediate order for ejectment. This judgment was embodied in a formal decree dated the 22nd October, 1926 (page 9 of Exhibit 13). But the decree does not refer to the Heads of Agreement, nor was the latter made an order of Court.

By an order of Court dated the 13th February, 1928, it was ordered that the decree in Civil Suit 235 of 1926 be executed and on the 4th April, 1928 Chellathamby was ejected from No. 5, Prince's Road. Chellathamby had paid no part of the $770 or of the costs of Civil Suit 235 of 1926.

On the 4th October, 1929 Chellathamby filed his plaint in the present suit. The plaint set out

the alleged trust of the land transferred to Veluppillay in January, 1924 though in somewhat different terms from those set out in the defence to Civil Suit No. 235 of 1926. With reference to the suit, the plaint states:—

> "22. Verbal negotiations thereupon took place between the Plaintiff and the Defendant through the mediation of persons named M. Cumarasami, W. Ponnudurai and V. Suppiah through whom and directly the defendant falsely represented that the Plaintiff's claims would be settled.
>
> "23. During the negotiations last men tioned the Defendant falsely represented to the Plaintiff that to effect a settlement, if the Plaintiff would consent to a decree for $680 – in the said suit No. 235 of 1926 the Defendant would:—
>
> (i) transfer to the Plaintiff land and houses comprised in and built on Kuala Lumpur Town Lots, 43, 44, 45, 46, 47 and 48 and 49 of section No. 47 respectively comprised in Grants Nos. 2904, 2905, 2906, 2907, 2908, 2909 and 2910.
>
> (ii) pay to the said N. Cumarasami a debt of $3,000.00 due and owing by the Plaintiff.
>
> (iii) pay to the Plaintiff a sum of $1,000/– to carry out repairs to the houses last mentioned.
>
> (iv) allow the plaintiff to remove all movable on the land at No. 5, Princes Road, Kuala Lumpur.
>
> (v) permit the Plaintiff to remain in the said 5, Princes Road, for 6 months free of rent.
>
> "24. The Plaintiff believed the representations made to him and relying thereon signed a document entitled "Heads of agreement" which did not set out the full terms of the arrangement alleged in paragraph 23 hereof."

It is the alleged verbal agreement set out in paragraph 23 of the plaint which Chellathamby now seeks to enforce.

The prayer to the plaint as originally framed claimed execution of the alleged trust of the land. But at the hearing counsel for Chellathamby abandoned this claim stating that it was barred by the Limitation Enactment. Counsel then asked for leave to amend the plaint by adding the words "and promised" after "falsely represented to" in para. 23 of the plaint and by substituting for the claim for execution of the trust in the prayer a claim for the enforcement of the verbal agreement alleged by para. 23.

Counsel for Veluppillay opposed this amendment arguing that it infringed the proviso to section 44 of the Civil Procedure Code that a plaint should not be amended "so as to convert a suit of one character into a suit of another and inconsistent character." I decided to hear the evidence and the suit has been heard as if the amendment had been made.

In my opinion the amendment is one which could properly be allowed. The amendment does not allege any new or different facts. It may be that the substitution of the new claim converts the suit into a suit of "another character," but it does not appear to make it of an "inconsistent character," and the words in Section 44 are "another and inconsistent character." I am confirmed in this view by Section 29 of the Civil Procedure Code which would prevent Chellathamby from afterwards suing on the verbal agreement if he omitted to do so in the present suit.

The first question to decide is whether evidence of the alleged verbal agreement is admissible. Section 92 of the Evidence Ordinance provides that when a contract has been reduced to writing, "no evidence of any oral agreement or statement shall be admitted as between the parties to any such instrument or their representatives in interest, for the purpose of contradicting, varying, adding to or subtracting from its terms" and by proviso 2:—

> "The existence of any separate oral agreement, as to any matter on which a document is silent and which is not inconsistent with its terms, may be proved. In considering whether or not this proviso applies, the Court shall have regard to the degree of formality of the document."

If the verbal agreement as set out in para. 23 of the plaint is compared clause by clause with the Heads of Agreement, there is, I think, only one provision in the former which can be said to contradict the latter; that is the provision in the verbal agreement that Chellathamby should be permitted to remain in No. 5, Prince's Road for six months free of rent. This obviously contradicts clause 6 of the Heads of Agreement which provides that so long as Chellathamby shall occupy No. 5, Prince's Road he shall pay a rent of $30 per mensem.

But I am also of opinion that the verbal agreement considered as a whole does vary or add to the terms of the Heads of Agreement. The Heads of Agreement is a formal document signed by Chellathamby in the presence of two witnesses. And in considering whether or not proviso 2 to Section 92 applies the Court is to have regard to the degree of formality of the document. The Heads of Agreement bears the title of Civil Suit No. 235 of 1926 and was clearly intended to contain their terms and all the terms for the settlement of that suit.

I am, therefore, of opinion that evidence of the verbal agreement alleged in para. 23 of the plaint is inadmissible. It follows that Chella-

thamby's claim fails, and that his suit must be dismissed.

[The remainder of the judgment deals with the question as to whether on the facts the additional oral agreement had been proved to have been made, and the Chief Justice found it had not been proved.—Editor.]

[APPELLATE CRIMINAL JURISDICTION]

BURTON, J.

June 16, 1930.

POH BAH CHEET.....Appellant

vs.

PUBLIC PROSECUTOR.....Respondent

[PERAK MAGISTRATE'S CRIMINAL APPEAL No. 35 of 1930]

Preventive detention—Severity of sentence.

The fact that a convicted prisoner has undergone terms of imprisonment does not of itself justify sentence to a further term. All the circumstances of the case must be considered, including the magnitude of the latest offence. There is no provision for preventive detention in this country.

English law in *Percy Victor Knell*, 19 Cr. App. R. 169, followed.

Appellant in person.

A. Sleep, Deputy Public Prosecutor, for Respondent.

BURTON, J.—The accused was charged with picking the pocket of Wong Han in Hugh Low Street, Ipoh, on 2nd March, 1930. He was convicted by R. S. Jervoise, Esq., Magistrate, Ipoh, and sentenced to one year's Rigorous Imprisonment, with 12 strokes whipping to be followed by 2 years' police supervision.

I think there is no doubt that this conviction is correct. The accused has an unusually bad record. This is his eighth conviction since January, 1923, and many of the offences he has committed would appear from the sentences to be among the more serious that come before a Magistrate's Court.

The Magistrate thought this is a case for preventive detention, and imposed the maximum sentence in his power. But there is no provision for such detention in this country, and the Magistrate should have treated the offence on its merits.

It is an established principle that the Magistrate in passing sentence should take into account all the circumstances including the magnitude of the offence in respect of which he is passing sentence. Hewart, L.C.J. said in *Percy Victor Knell*, 19 Cr. App. R. 169.

> "It has been said again and again in this Court that the mere fact that a man has committed serious offences and suffered long terms of detention in respect of them is not in itself a reason for imposing a sentence of a long term afterwards because of the previous sentences when the offence charged is a minor offence."

On this principle I reduced the sentence to 3 months' R.I., and remitted the sentence of flogging. The order for police supervision is to stand.

[SPECIAL CRIMINAL JURISDICTION]

ELPHINSTONE, C.J.

August 21, 1930.

GURDIT SINGH.....Petitioner

[SELANGOR CRIMINAL APPLICATION No. 4 of 1930].

Criminal Procedure Code, 1926, Section 363 (i) (b)—Habeas Corpus.

A person is not improperly nor illegally detained when he has been sentenced to imprisonment by a Judge of the Supreme Court in a case properly brought before him, and it is not proper for another Judge of the Supreme Court to act under Section 363 of the Criminal Procedure Code to decide that question.

E. Pratt for the Petitioner.

B. G. Bradley, Deputy Public Prosecutor, for the Public Prosecutor.

The facts appear sufficiently from the judgment of Elphinstone, C.J.

ELPHINSTONE, C.J.—This is an application by a person who has been sentenced to three months' rigorous imprisonment by Mudie, J., for an order that he may be set at liberty under section 363 (b) of the Criminal Procedure Code.

The applicant was convicted of the offence of bringing a false charge. The magistrate ordered that he be bound over to keep the peace by a bond for a period of 6 months or in default to undergo 6 months' simple imprisonment. The applicant appealed against the conviction to the Court of a Judge. Mudie, J., dismissed the appeal against the conviction but set aside the order requiring the appellant to give security, and in lieu of that he sentenced the appellant to three months' rigorous imprisonment.

Section 363 (b) of the Criminal Procedure Code, under which the application is made, reads as follows:—

> "The Court of a Judge may whenever it thinks fit direct
>
> (1) that any person who.....
>
> (b) is alleged to be illegally or improperly detained in public or private custody within the limits of the Federated Malay States be set at liberty."